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BY HAND AND ELECTRONIC MAIL

Mary Cottrell, Secretary
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

Re: Department Request for Comments re Section 271 Tariffing

Dear Secretary Cottrell:

On April 12, 2005, the Department of Telecommunications and Energy ("Department") issued a request for comments relating to the issue of whether Verizon must offer Section 271 elements under state tariff. Specifically, the Department asked for comments in response to the following question:

> Whether the manner in which Verizon proposes to offer Section 271 arrangements through negotiated agreements based on the particular needs of individual CLECs, as described by Verizon's March 31, 2005, letter, constitutes "common carriage" pursuant to G.L. C. 159, §§12 and 19?[1]

In this letter, we provide AT&T's response to the Department's question. Following our response to the Department's question, we briefly address Verizon's other basis for its claim that the Department cannot require it to tariff Section 271 services: the specious argument that the FCC has asserted exclusive jurisdiction over Section 271 services.

I. Section 271 Services and Elements Constitute "Common Carriage."

Verizon had previously stated that it does not intend to file state tariffs; rather, it "intends to offer enterprise switching and other Section 271 arrangements in the state solely through individually-negotiated contracts based on the particular circumstances, needs and requirements of the carrier customers."[2] Based on its "intent" to offer Section

[1] Hearing Officer Request for Comments, April 12, 2005 ("DTE Request For Comments"), at 1.

[2] DTE Request For Comments, at 1, quoting Letter from Bruce P. Beausejour to Mary L. Cottrell, dated January 4, 2005.

271 "arrangements" through individually negotiated contracts, Verizon maintains that its provision of Section 271 elements and services does not constitute "common carriage" and, therefore, it has no obligation to file a tariff. As we explain below, Verizon's argument is circular; it provides no basis for treating its provision of Section 271 elements and services as something other than common carriage, beyond Verizon's mere assertion that it intends to provide these services on the assumption that common carriage duties do not apply.

Common carriage duties arose in common law out of a need to protect purchasers in situations where there is inherently a gross difference in bargaining position between the suppliers of goods and services and their purchasers.[3] Such differences in bargaining position have typically arisen in infrastructure industries where there are only a few, or just one, monopoly supplier, or in situations where the supplier has inherent leverage, such as taxi cabs (and, before the advent of the automobile, inns), where there may be no viable alternative at the time and place that the service is offered. It was important, therefore, to ensure that the suppliers did not exploit their inherent power to extract monopoly profits. One manner in which unregulated providers of common carriage can exercise their bargaining leverage is to price discriminate so as to take advantage of consumers more desperate for the service or with fewer alternatives in the particular situation. As the Department knows, protection of the public interest has been achieved by requiring the suppliers in such situations to file a standard schedule of prices to ensure that services with the same cost are provided at the same price. Discrimination among purchasers is prohibited.

In its January 4, 2005, letter to the Department, Verizon gave its reasons for why it is not required to file a tariff for Section 271 services. As noted above, its reason is based on the assertion that it intends to offer such services in individually negotiated contracts based on the particular circumstances of the customer. This, however, is no reason why the provision of Section 271 services is not "common carriage." All providers of common carriage would like nothing more than to be able to negotiate individual arrangements in specific circumstances; it is precisely in this way that they are able to exploit their superior bargaining position. One can only imagine what would happen to taxi fares if taxi cab drivers could negotiate their specific arrangements, depending upon whether the prospective purchaser is standing in the rain, or carrying a large number of bags, or is desperate to reach her destination. If the criterion for deciding whether a service is common carriage or not is what the service provider *would like to do in the absence of regulation*, no service would constitute common carriage. Common carriage must be defined on the basis of criteria that are not related to what the service provider would like to do absent regulation. It must be defined on the basis of the harms (such as price discrimination) that would be caused by what the service provider *would do* in the absence of regulation.

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[3] *Western Union Telegraph Co. v. Call Pub. Co.*,181 U.S. 92, 99-103, 21 S.Ct. 561 (U.S. 1901). *See also*, *Western Union Telegraph Co. V. Foster*, 224 Mass. 365 (1916), *rev'd on other grounds.*

Based on the treatment that the 1996 Telecommunications Act affords to Section 271 service, we know such service is common carriage. Indeed, all of the elements of common carriage are present in Section 271 elements and services. In order to prevent remonopolization of the bundled local/long distance telecommunications market, Congress established an independent obligation in the 1996 Telecommunications Act *requiring* regional bell operating companies ("RBOC"), such as Verizon, to provide Section 271 services to all of their competitors on a *non-discriminatory* basis in any jurisdiction in which the RBOC received approval to provide bundled local and long distance service. The requirement to provide the service on a non-discriminatory basis to all competing carriers in order to protect against the exercise of superior bargaining power demonstrates its nature as one of common carriage.

Section 271 service is an essential service, with no alternative service providers, for Verizon's competitors in the provision of bundled local and long distance service. Because "common carriage" is defined on the basis of the inherently superior bargaining power of a monopoly over an essential service that the provider *must* offer to all persons in a class, and the dangers of price discrimination if left unregulated, Section 271 services, which Verizon must by law offer on a non-discriminatory basis, are inherently "common carriage."

II. The Department Has Concurrent Jurisdiction With The FCC Over Section 271 Services and Elements.

Verizon spills much ink on another ground for its claim that the Department cannot require it to file a state tariff for the provision of Section 271 services and elements. Verizon contends that the FCC's assertion of jurisdiction *ousts* state jurisdiction over Section 271 services and elements. Verizon goes on for paragraphs pointing to support for its claim that the FCC has asserted jurisdiction over Section 271 services and elements. Unfortunately for Verizon, however, that is not the relevant issue. That the FCC has asserted such jurisdiction is not in dispute. The question the Department must address is whether the FCC has asserted ***exclusive*** jurisdiction. And on this relevant issue, Verizon points to no language where the FCC asserts that its jurisdiction over Section 271 elements is exclusive and that the states do not concurrently have jurisdiction as well.

Indeed, for all the reasons that AT&T set forth in Issue 31 in both its initial and its reply brief in D.T.E. 04-33, the Department has jurisdiction over the rates and terms of Section 271 elements *because the express language of Section 271 requires it*. AT&T will not repeat its arguments here but incorporates its arguments in D.T.E. 04-33 here by reference. We also attach a copy of the relevant section of our reply brief in that case where we respond to essentially the same specious arguments that Verizon makes here (and the same irrelevant case authority it offers here) putatively in support of FCC exclusive jurisdiction. Although the language in the 1996 Act to which we point in the attached section of our brief that demonstrates state jurisdiction over the provision of

Section 271 elements relates to interconnection agreements, it nevertheless conclusively rebuts Verizon's extreme claim that the FCC has, or even lawfully could, oust the states from jurisdiction over Section 271 terms and conditions.

Thank you very much.

Respectfully submitted,

Jay E. Gruber

cc: DTE 03-60 Service List